No. 12-464

In The
Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

For six years, the government has urged the courts below to apply the speedy trial test in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine the Kaleys' due process rights. In this Court, the government abandons that position. Government's Brief ("GB"):36, n.10. Instead, the government proposes that *Medina v. California*, 505 U.S. 437 (1992), provides the appropriate framework, GB:18-21; that a grand jury's finding of probable cause is "conclusive" *for all purposes* until trial, GB:21-37; and that the Kaleys should be denied any adversarial judicial review because some other hypothetical defendants might, in the future, abuse the proposed procedural safeguards. GB:44, 47. The Court should reject these arguments, which seek to deprive defendants of the right to be heard and the right to counsel of choice.

I. *Medina* Is Inapplicable

For the first time in this case, the government urges the Court to use the test in *Medina*, 505 U.S. at 445, to analyze what the government characterizes as an "attack" by the Kaleys on "the unreviewable character of the grand jury's probable cause determination." GB:19. *Medina* addressed a due process challenge to a *state* rule of criminal procedure (regarding the burden of proof in competency hearings), thus touching on "principles of federalism that are not implicated in this case." Amicus Brief for Institute for Justice 18, n.35. Moreover, *Medina* involved the

procedures used ***during*** a state criminal proceeding, not the "deprivation of property ***pending*** a criminal proceeding." *Krimstock v. Kelly*, 464 F.3d 246, 254 (2d Cir. 2006) (emphasis added) (rejecting *Medina* in analyzing due process right to a hearing when the state seizes an automobile incident to arrest as an instrumentality of the crime charged). Thus, this Court in *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993), applied the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *Medina*, to address the due process implications of seizing, without a hearing, real property alleged to have facilitated criminal activity. *See also Boumediene v. Bush*, 553 U.S. 723, 781-83 (2008) (applying *Mathews* to test the process due in military tribunals).

Even under *Medina*'s test, the Kaleys prevail. "The legislature cannot 'validly command that the finding of an indictment . . . should create a presumption of the existence of all the facts essential to guilt.'" *Patterson v. New York*, 432 U.S. 197, 210 (1977) (quoting *Tot v. United States*, 319 U.S. 463, 469 (1943)). The absence of any meaningful and timely opportunity to be heard and challenge the basis of a court order restraining property they need to employ counsel of choice "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson*).

II. A Grand Jury's Finding of Probable Cause Is Not "Conclusive" as to Whether a Court May Continue Restraining Property Needed to Retain Counsel of Choice

Having mischaracterized the Kaleys' claim as an attack on the "quintessential and historic feature of the criminal justice system," GB:19, the government's brief is largely devoted to attacking a straw man – that the Kaleys are challenging the "centuries-old rule that the grand jury provides the appropriate procedure for deciding whether probable cause exists" to return an indictment. GB:36. But the Kaleys are not objecting to the grand jury's authority to indict them. Nor are they objecting to the district court relying on the indictment to enter a ***temporary*** restraining order before hearing from them. Rather, the Kaleys are objecting to the district court continuing to restrain their property until trial despite a demonstrably defective theory of prosecution. They are objecting to a procedure that requires a court to restrain their assets and thereby deprive them of counsel of choice – while declining to consider unrebutted evidence of their innocence.

The Constitution envisioned that the grand jury's finding of probable cause would be used for a single purpose – to initiate felony criminal prosecutions. *See generally Costello v. United States*, 350 U.S. 359, 409 (1956) ("An indictment . . . is enough to call for trial of the charge on the merits."). The Court has insulated a grand jury's deliberations from pretrial challenge to ensure that the grand jury can fulfill its limited

constitutional function as an "accusatory" body, not an "adjudicative" one. *United States v. Williams*, 504 U.S. 36, 51 (1992). *Accord United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."); *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Circuit Justice) ("The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, *so as to require him to stand his trial. Because of this limited function*, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay . . . or by the introduction of evidence obtained in violation of the Fourth Amendment. . . .") (emphasis added; citations omitted).

When the government seeks to use a grand jury's accusatory finding to insulate a restraining order from judicial review, it is taking the proverbial fish out of water. The Fifth Amendment authorizes grand juries to return only indictments, not injunctions. Once an indictment is returned, the grand jury has "completed its essential function." *See* Brief for the United States, *United States v. Williams*, No. 90-1972 (Nov. 29, 1991), 1990 U.S. Briefs 1972, 1991 U.S. S.Ct. Briefs LEXIS 653, at *27. The court, not the grand jury, then exercises its power by entering an order restraining property. The court, not the grand

jury, must then provide the property owner due process of law.

The purpose for which the government seeks to use the grand jury's finding here – the preservation of assets subject to an *in personam* forfeiture action – is one that the Founding Fathers most certainly never intended. They so disdained English *in personam* "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. Const., art. III, § 3, cl. 2. The First Congress in 1790 then extended the ban to *all* felonies. *See United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the *in personam* forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); and not until 1992 that Congress permitted forfeitures for money laundering (18 U.S.C. § 982), a crime that was not codified until 1986 (*see* 18 U.S.C. § 1956). If requiring a grand jury to consider exculpatory evidence would be a "distortion of the grand jury's traditional responsibility," Brief for the United States, *United States v. Williams*, 1991 U.S. S.Ct. Briefs LEXIS 653, at *27, surely, then, permitting the government to use the grand jury's finding to restrain a defendant's assets – for a purpose that was banned in 1790, for a crime that was not codified until 1986 and for a punishment that was not authorized until 1992 – would be an even greater "distortion" of that "traditional responsibility." *See generally* Amicus Brief for Gun

Owners Fnd., *et al.* 5-7; Amicus Brief for Cal. Attorneys for Crim. Justice 4-9. Moreover, the government is proceeding under a facilitation theory of forfeiture to restrain the Kaleys' home, which "differs not only in degree, but in kind, from its historical antecedents." *Good,* 510 U.S. at 82 (Thomas, J., concurring in part and dissenting in part).

Paraphrasing Chief Justice Rehnquist's dissent in *Good*, 510 U.S. at 67-68, the government portends a "legal cognitive dissonance" where "the defendant might simultaneously be told that probable cause exists to believe that he committed a crime for purposes of proceeding to trial . . . but no probable cause exists to believe that he committed a crime for purposes of restraining his assets." GB:34. The "integrity of the criminal justice system" is not "jeopardize[d]," and "the public's confidence in the criminal proceedings" is not "damage[d]," GB:34, when a judge makes a ruling reflecting his/her own judgment, based on the facts and legal arguments presented in open court, even one that seemingly conflicts with the grand jury's. To the contrary, it highlights the independence of the judiciary. Routinely, district courts examine whether the government had sufficient evidence of probable cause to obtain search warrants and wiretaps. Grand jury indictments are never "conclusive" on that question. *Cf. Franks v. Delaware*, 438 U.S. 154, 170 (1978) (rejecting government's argument that "a post-search hearing will confuse the issue of the defendant's guilt," recognizing that "[a]n issue extraneous to guilt already is examined in any

probable-cause determination or review of probable cause"). A greater threat to the "integrity of the criminal justice system" and "the public's confidence in the criminal proceedings" is a rule of law that obligates a judge to rubber stamp a (government-drafted)[1] protective order restraining a defendant's assets based solely on a secret, one-sided grand jury proceeding that the judge did not observe.

The government's reliance on *Gerstein v. Pugh*, 420 U.S. 103 (1975), for the proposition that a grand jury's finding of probable cause must be "conclusive on the issue of probable cause" for purposes beyond limited post-arrest detention, GB:21-22, is, as this Court explicitly stated, "misplaced." *Good,* 510 U.S. at 50. In *Gerstein*, a civil class action lawsuit, the Court held that prompt ***non-adversarial*** judicial review is sufficient to protect a just-arrested defendant's Fourth Amendment rights. *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("[J]udicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."). *Gerstein* did not address the Fifth Amendment implications of continuing the detention through trial (much less the restraint of assets, whether for counsel or otherwise).

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[1] Together with its first ex parte motion for a protective order, the government submitted a proposed order for the judge to sign, which he did. *Compare* DE 5-1 (proposed order) *with* DE 6 (signed order).

In *United States v. Salerno*, the Court did, upholding pretrial detention where the statutory scheme contained "extensive safeguards," including an adversarial hearing, which "far exceed[ed] what we found necessary to effect *limited post-arrest detention* in *Gerstein v. Pugh*." 481 U.S. 739, 752 (1987) (emphasis added). Those additional "safeguards" were essential to the Court's holding. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("government detention violates [ ] [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections. . . .") (citing *Salerno*); *Demore v. Kim*, 538 U.S. 510, 549-550 (2003) (Souter, J., dissenting) ("In deciding [ ] *Salerno* . . . it was crucial that the statute provided that, 'in a full-blown adversary hearing, the Government must convince a neutral decisionmaker. . . . '"); *id.* at 577 (Breyer, J., dissenting) ("Kim's constitutional claims to bail in these circumstances are strong.") (citing Justice Souter's opinion approvingly). The procedural safeguards include "a pretrial hearing at which the presiding judge is explicitly mandated to consider, *inter alia,* 'the weight of the evidence against the person' in reaching a bail determination . . . ***a reconsideration of the evidence previously weighed by the grand jury, and thus of its probable cause determination***." *United States v. Monsanto*, 924 F.2d 1186, 1194 (2d Cir. 1991) (en banc) (emphasis added).

Pretrial detention cases abound in which courts independently weigh the evidence supporting an

indictment to determine the strength of the government's case, *see* Amicus Br. Cal. Attorneys for Crim. Justice 10-18, even if "only insofar as it sheds light on whether the defendant is likely to flee (because the case against him is so strong) or presents a danger to the community." GB:26. No case cited by the government precludes the court from considering exculpatory evidence and, doubting the defendant's guilt, ordering release on bail, the grand jury's seemingly contradictory probable cause "finding" notwithstanding.

There is no anomaly in observing that the Fourth Amendment permits the arrest of a defendant without adversarial judicial review while the Fifth Amendment thereafter guarantees an adversarial hearing to determine whether the defendant should be released before trial. *See Good,* 510 U.S. at 50 (rejecting the government's assertion, based on *Gerstein*, that "the Fourth Amendment provides the full measure of process due under the Fifth."). Indeed, the Court has frequently found that a result unavailable under one constitutional right may be obtainable under another. *See, e.g., Fellers v. United States*, 540 U.S. 519, 523-24 (2004) (suppressing statements under Sixth Amendment despite finding no Fifth Amendment violation); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (requiring more than "probable cause" to justify seizure of allegedly pornographic books because the books were "presumptively protected by the First Amendment").

Pretrial restraint of assets may prove more damaging to a defendant, particularly in the long-run, than pretrial detention of limited duration. Detention does not prohibit the defendant from using his life's savings to employ counsel and fund his legal defense. In contrast, a protective order restraining a defendant's property for that same limited duration can forever deprive the defendant of his counsel of choice at the trial that will determine whether he gets his property (and freedom) back. No doubt, incarceration – even mere accusation – can affect a defendant's finances, particularly his ability to earn future income. GB:26-27. However, before the reincarnation of *in personam* forfeitures, the filing of an indictment never justified taking from the defendant his *already-earned* property. When the government seeks to "assert ownership and control over the [defendant's] property itself," the government's conduct "must comply" with due process. *Good*, 510 U.S. at 52.

The government's argument creates its own anomalies. In *Good*, the defendant, whose property was seized pursuant to a forfeiture action, had *already pled guilty* to drug offenses. Yet, this Court held that he was still entitled to a *pre*-seizure probable cause hearing. The Kaleys have not pled guilty; they are contesting the charges but, in the government's view, they are barred from challenging probable cause at a *post*-restraint hearing because the grand jury returned an indictment.

That an indictment "may establish grounds for suspending the employment of employees in regulated industries," GB:27, does not establish probable cause for other purposes or insulate it from challenge. Thus, the government overstates the significance of *FDIC v. Mallen*, 486 U.S. 230 (1988), about a bank officer whose employment was summarily suspended upon indictment for lying to the FDIC. GB:27 & n.8. The Court was satisfied that the existence of an indictment "demonstrate[d] that the suspension [was] not arbitrary," *id.* at 244, and thus a sufficient basis to initiate the suspension – just as an indictment is sufficient to initiate the ex parte restraining order affecting the Kaleys' property. But within a "brief period" of time, *id*. at 241, the banker would receive a post-suspension hearing at which he could make an "extensive evidentiary record" challenging the suspension. The Court did not suggest that the grand jury's finding of probable cause was immune from challenge or that it would carry any weight or preclusive effect at the *post*-suspension hearing. Nor was there any indication that the suspension and corresponding loss of income had *any* impact on his criminal case.

The hearing demanded by the Kaleys would cause no violence to the grand jury's historic function of initiating prosecutions. The hearing would not look back; it would not require the district court to examine the evidence presented to the grand jury in 2007. The hearing would focus exclusively on the evidence the government can marshal and present to the

district judge at the time the post-indictment hearing is convened. The government would need to establish "the probable validity of the underlying claim," *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (quoting *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring)), *i.e.*, "the probability that [its] case [would] succeed." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974).[2] If the government fails to meet its burden, the judge would modify the protective order to allow the Kaleys to use their property to fund their legal defense, including retaining counsel of choice. Meanwhile, the indictment would remain intact.

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[2] Notwithstanding what the Kaleys submit is *dicta* in *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (government may "restrain property . . . based on a finding of probable cause"), the Kaleys have urged that the government must establish a "substantial probability" that the government will prevail. Petitioner's Merits Brief ("PMB") 25, 32; JA 106, 122. Given the constitutional rights at stake, there are powerful reasons why the burden should be higher than mere probable cause. *See* Amicus Brief for NACDL 12 ("The restraint of the Petitioners' assets implicates the Fourth, Fifth, Sixth, and First Amendments. . . . The seizure is a meaningful interference with [the Petitioners'] possessory interests in their assets . . . threatens their structural right to the assistance of their counsel of choice. . . . denies an individual his right to speech, denies society access to that speech, and depletes the marketplace of protected ideas . . . [because] legal advocacy (particularly against the government) constitutes political speech. Thus, a seizure that threatens to irremediably deny a defendant his right to counsel of choice is constitutionally unreasonable when it is supported by only probable cause.").

The task is simplified in this case because the government already developed a complete record upon which the district court can rule: The trial of the acquitted co-defendant Gruenstrass. Although the government repeats the prosecutor's assertion below that the government did not present at the Gruenstrass trial all the evidence it had against the Kaleys, GB:9, n.3, no proffer of such additional evidence was made, not even *in camera*, so far as the record reflects. In any event, the government does not need more evidence; it needs a viable theory of prosecution. *See United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988) ("The district court . . . correctly dismissed the indictment, not because the government could not prove its case, but because there was no case to prove").

The government concedes that an indictment "invalid on its face" is subject to pretrial challenge, but asserts that the Kaleys have not made such an argument. GB:30. Actually, they did: Ever since the government announced its defective theory of "property" in its bill of particulars, DE 74-75, and during co-defendant Gruenstrass's trial, PMB:22-23 (citing DE 187:842-43), the Kaleys have argued that the charges were not only factually unsupported but also legally invalid under binding precedent. JA 79, 106-29. The Kaleys also argued that the government had constructively amended the indictment by shifting its theory of prosecution from hospital-as-owner to employer-as-owner. JA 80-81, 144-45. The government persuaded the courts below that they did not

have the power to modify the protective order, so the courts never ruled on the legal challenges.

III. The *Mathews* Factors Overwhelmingly Favor a Hearing at Which Defendants May Challenge Probable Cause

Although the application of the *Mathews* test usually results in "categorical" rulings, *see, e.g., Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011); *Good*, 510 U.S. at 62, the Court decides cases on their facts, not in a vacuum. "It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (citation omitted). The practical reason for this rule is that "a real case or controversy may well present questions that appear quite different from the hypothetical questions. . . ." *Bellotti v. Baird*, 443 U.S. 622, 656 n.4 (1979) (Rehnquist, C.J., dissenting). Thus, the government cannot casually dismiss the circumstances of this case as "idiosyncratic," GB:46, but must argue the constitutional point "with reference to the particular facts to which it is to be applied." *Clinton,* 520 U.S. at 690 n.11.

In the battle between the Kaleys and the government over the property rights at stake, there is no contest. The Kaleys have been convicted of nothing and, therefore, they are still "genuinely the 'owner[s]'" of their home. *See United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 134 (1993) (Scalia, J., concurring). The government does

not own the property now and may never. Thus, this is not a case like *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 621 (1989), in which the lawyers wanted to be paid from assets the defendant agreed to forfeit *after* pleading guilty to drug charges. By then, the government's title to the assets had vested. *See Buena Vista*, 507 U.S. at 126.[3] At most, the government has a contingent "right to forfeit," which is "too ethereal" to constitute a property right. *United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992); *see also United States v. Hosseini*, 436 F. Supp. 2d 963, 965-67 (N.D. Ill. 2006) (dismissing portion of indictment pretrial based on theory that the government had "'[a]n intangible right to a possible future forfeiture. . . .'").

The Kaleys' property rights are entitled to great weight, regardless of what they propose to do with their property. *See* Amicus Brief for Institute for Justice 3, 26-33. That the Kaleys need immediate access to their property to fund their legal defense and employ counsel heightens their interest. After all, the Sixth Amendment right to counsel of choice is structural. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

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[3] The Court's tax precedents are distinguishable for similar reasons. Under *Manning v. Seeley Tube & Box Co. of New Jersey*, 338 U.S. 561, 565-66 (1950), the government's right to unpaid taxes is deemed to vest at the moment the taxes accrue.

The government tries to mitigate the significance of the Sixth Amendment by referring to it as only a "qualified" right and foreshadowing abuses by defendants if the restraining order were modified. GB:47 ("[S]ome defendants would use the unrestrained assets to pay for counsel; some might use them for other purposes, including criminal enterprises, or simply attempt to remove them from the reach of the court."). But the possibility that a right might be abused by some does not justify denying that right to all.[4] "[I]n the *Mathews* calculus, we consider the interest of the *erroneously* detained individuals," *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.) (citation omitted; emphasis in original), not the interest of someone found abusing the right in question.

Courts, and the government itself, are fully capable of policing potential abuses. Attorneys who launder proceeds of their clients can be prosecuted and incarcerated. *E.g., United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005). Attorneys who disobey court orders or improperly disrupt the trial proceedings

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[4] For example, defendants have the right to be present at trial and confront witnesses but may forfeit those rights by fleeing the jurisdiction after trial has commenced, *see Crosby v. United States*, 506 U.S. 255, 259 (1993), or by intimidating witnesses, *Reynolds v. United States*, 98 U.S. 145 (1878); Fed. R. Evid. 804(b)(6). In rare circumstances, a disruptive defendant may even be bound and gagged, *see Illinois v. Allen*, 397 U.S. 337, 344 (1970), but the extraordinary need to do so in one case does not justify shackling defendants in all cases. *See Deck v. Missouri*, 544 U.S. 622 (2005).

may be held in contempt. *E.g.*, *United States v. Burstyn*, 878 F.2d 1322, 1326 (11th Cir. 1989). Defendants who change counsel to delay the trial are denied continuances. *E.g., United States v. Maldonado*, 708 F.3d 38 (1st Cir. 2013). Just as "[t]he Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them," *Caplin*, 491 U.S. at 634-65, the due process right to a hearing is not foreclosed merely because other defendants or their attorneys "may abuse the processes available to them. . . ." *Id*.

The government's exaggerated fears about "mini-trials," "premature disclosure" and "safety of witnesses," GB:15, 44-45, are belied by the historical record of the past 25 years.[5] *See* Amicus Brief for New York Council of Defense Lawyers. In 2008, when pressed at oral argument by the District of Columbia Circuit, "the government could not identify any harm to its law enforcement efforts in the Second Circuit that has resulted from the *Monsanto* standard." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 n.1 (D.C. Cir. 2008). As in the suppression hearing context, courts are well equipped to police potential

[5] As authority for the proposition that defense attorneys will abuse the process to get a sneak peak at discovery, the government cites to itself – the views of the then-acting Deputy Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice in one of the four articles he published in 2004 promoting the Department's litigation positions.

abuses. *Cf. Franks*, 438 U.S. at 170 ("The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction."). For their part, the Kaleys agreed to proceed based on the record the government created by insisting on trying co-defendant Gruenstrass first, as well as the plea and sentencings transcripts of two "co-conspirators." JA 84. No witness safety concerns have been suggested in this "white collar" case.

Preserving funds for restitution, GB:41, surely is not driving the government's aggressive pursuit of the Kaleys' assets. No "victim" has surfaced in the seven-plus years since the Kaleys were first told that they were under investigation for allegedly stealing the devices. Actually, the prosecutor conceded in the case of another sales representative that "we can't make restitution" because the products could not be traced to any specific hospitals. PMB:11. The restraint of assets is primarily based on a facilitation ("involved in"), not a proceeds, theory of forfeiture, in which only the government stands to benefit from forfeiting the equity in the Kaleys' home.

The government's "direct pecuniary interest in the outcome of the proceeding," *Good*, 510 U.S. at 56 – admittedly to fund its own operations, GB:42 – is a more compelling reason to *grant* hearings, not to deny them. *See* Amicus Brief for Institute for Justice 33-37. "It makes sense to scrutinize government action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of

Scalia, J.). Given that "[v]irtually every federal investigative agency and prosecuting authority has a significant financial stake in the success of the government's two forfeiture funds, . . . a timely adversary hearing is necessary to provide the requisite neutrality and due process that is missing from a prosecution-driven ex parte process." Amicus Brief for FACDL 26, 28 (collecting data).[6]

The risk of erroneous fact-finding also weighs heavily in the Kaleys' favor. The hallmarks of due process – the right to be present and the opportunity to be heard – do not apply to grand jury proceedings. They are "'closed and accusatorial'" proceedings, so "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact." *See Boumediene*, 553 U.S. at 785 (citation omitted).

The government tries mightily to bolster the reliability of grand juries by citing a 93% conviction rate in 2012. GB:50. But "97 percent of federal convictions . . . are the result of guilty pleas," *Missouri v. Frye*, 132 S.Ct. 1399, 1402 (2012), "many of which are

[6] Reported abuses by the government of its forfeiture power was a major impetus for the enactment of forfeiture reform legislation in 2000. *See* Barry L. Johnson, *The Civil Asset Forfeiture Reform Act of 2000 and the Prospects for Federal Sentencing Reform*, 14 Fed. Sent. R. 98 (Sept./Oct. 2001). Yet, the abuses keep mounting. *See* Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, The New Yorker, Aug. 12, 2013.

the result of a bargain between the prosecution and defense that some charges will be reduced or dropped." Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 276-77 (Jan. 1995). The resulting guilty plea will then mask whether "the grand jury simply accepted the prosecutor's recommendation on the higher charge even though the evidence would only support a lesser offense." *Id.* at 277.[7] Moreover, ***of defendants who did not plead guilty in 2012, the conviction rate was a dismal 21%***. Statistical Tables for the Federal Judiciary, Table D-4, U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense During 12-Month Period Ending Dec. 31, 2012.[8]

Although admitting that it is "conceivable that an adversary hearing may expose a lack of probable

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[7] Money laundering cases are particularly susceptible to abuse. *See Comment: Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U.L. REV. 289 (1999).

[8] According to the table, in 2012 the government "disposed of" 95,281 defendants, of whom 84,974 pled guilty, leaving 10,307 who did not plead guilty. Of those, 1,959 were convicted by a jury, 183 convicted by a judge, a total 2,142 convictions, for a conviction rate of 21%. The remaining 8,165 defendants (79%) were not convicted, either because they were acquitted at trial or their case was dismissed. For money laundering defendants who did not plead guilty, the conviction rate was 24%; for transportation of stolen property defendants, 28%. http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/D04Dec12.pdf.

cause," the government argues that a hearing to "winnow out the needle in the haystack cannot be found to be constitutionally compelled, given its serious costs." GB:15-16. To mix metaphors, the government can only make such an argument by keeping its head buried in the haystack. In 1997, Congress enacted the Hyde Amendment, 18 U.S.C. § 3006A, waiving sovereign immunity to permit attorney fee awards for vexatious prosecutions. Despite the "daunting burden" of having to prove *both* bad faith *and* the lack of probable cause in order to win fee awards, *United States v. Gilbert*, 198 F.3d 1293, 1302-03 (11th Cir. 1999), published examples of vexatious prosecutions are not hard to find: *E.g., United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004) (affirming award for $1,494,650.32), *cert. denied*, 543 U.S. 868 (2004); *United States v. Adkinson*, 360 F.3d 1257 (11th Cir. 2004) (affirming award for $100,169.75 where government indicted defendants on a fraud theory that was contrary to Eleventh Circuit precedent); *United States v. Schlieffen*, 2008 U.S. Dist. LEXIS 116907 (Magistrate's Report awarding $356,824), *aff'd*, 2009 U.S. Dist. LEXIS 16843 (S.D. Fla., Mar. 5, 2009);[9] *United States v. Braunstein*, 281 F.3d 982, 996 (9th Cir. 2002) (remanding to award fees to a defendant prosecuted for fraud and money laundering where

[9] Mr. Schlieffen served seven years in prison before the government's misconduct was discovered and his case was dismissed but he died before he could collect the award. *Schlieffen*, 2008 U.S. Dist. LEXIS 116907, at **4-5.

"the government's position was so obviously wrong as to be frivolous," particularly because "[a]ll of this [exculpatory] information was in the AUSA's possession prior to her decision to seek a grand jury indictment. . . .").

Furthermore, this Court has been called upon to intervene on multiple occasions to halt misguided theories of prosecution alleging crimes similar to those with which the Kaleys are charged: ***fraud***, *e.g., Skilling v. United States*, 130 S.Ct. 2896 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000); *Neder v. United States*, 527 U.S. 1 (1999); *McNally v. United States*, 483 U.S. 350 (1987); ***money laundering***, *Regalado Cuellar v. United States*, 553 U.S. 550 (2008); *United States v. Santos*, 553 U.S. 507 (2008); and ***obstruction of justice***. *E.g., Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995). These rulings prompted countless coram nobis petitions belatedly undoing the damage to the wrongfully convicted. *See generally* M. Diane Duszk, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979 (Apr. 1990).

The ease with which prosecutors are able to secure such indictments is no surprise given that grand jurors are ordinary citizens with "small and sometimes no skill in the science of law" and are "incapable, generally, of determining for [themselves] whether the indictment is good or bad." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (citations omitted). Prosecutors admit of no obligation to school

grand jurors on the elements of (or defenses to) the crimes for which they have been asked to indict. *See United States v. Lopez-Lopez*, 282 F.3d 1, 9 (1st Cir. 2002). Without guidance from a judge, grand juries will indict even when the undisputed conduct does not violate the statute. *E.g.*, *United States v. Velez*, 586 F.3d 875, 876 (11th Cir. 2009) (attorney indicted for money laundering for engaging in "monetary transactions made for the purpose of securing legal representation" which the appellate court concluded were "exempt from criminal penalties under [18 U.S.C.] § 1957(f)(1).").[10]

The limitations of grand juries to serve as a shield against "reckless or unfounded charges," *United States v. Mandujano,* 425 U.S. 564, 571 (1976), is underscored by this case. The grand jury foreperson did not sign the initial indictment, which sought a forfeiture judgment of $2.2 million on a "proceeds" theory when, as the prosecutors later conceded, they could only trace $140,000. PMB:7-8. When it became clear that the court was going to limit the restraint to $140,000, it took only *two business days* for prosecutors to convince a grand jury to re-indict the Kaleys for the new charge of money laundering despite no evidence of concealment. PMB:20. When forced to identify the purported owner of the allegedly stolen

[10] The grand jury's power to bring presentments was abolished in 1946 when the Federal Rules of Criminal Procedure were adopted. *See* Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 830-33 (June 2000).

property, the government constructively amended the indictment by naming a different owner, JA 74-75, than the one(s) identified earlier in the proceedings. PMB:8-11. That disclosure exposed a fatal defect in the theory of prosecution. PMB:21-22.

CONCLUSION

What the government seeks is an unreviewable veto power over the exercise of a constitutionally protected structural right. *See* Amicus Brief for American Bar Association 16 ("These harms to both the reality and the appearance of fairness of the criminal justice system are all the more striking because, absent a meaningful pretrial adversarial hearing, the full power to decide whether to intrude into a defendant's choice of counsel – and when to do so – is controlled by the prosecution."); Amicus Brief for CATO Institute 12 (warning that "prosecutors can use forfeiture to strategically disarm the defense."). If, in the government's view, the Kaleys are denied the attorneys who have been championing their cause for over six years, too bad. And if the Kaleys are convicted after having been represented by other counsel, on appeal the conviction will be relied upon as an affirmation that the government was right all along. The Court should be wary of "an unchecked system," *Hamdi*, 542 U.S. at 530, where irrebuttable presumptions favoring the government "interfere[ ] with a defendant's Sixth Amendment right to counsel of choice, and the guarantee afforded by the Fifth Amendment's Due

Process Clause of a 'balance of forces' between the accused and the Government." *Monsanto*, 491 U.S. at 614.

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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